

2010 LSBC 05

Report issued: March 24, 2010

Oral Reasons: March 4, 2010

Citation issued: August 12, 2009

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Douglas Warren Welder

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: March 3 and 4, 2010

Panel: Leon Getz, QC, Chair, Robert Brun, QC, Alan M. Ross

Counsel for the Law Society: Maureen Boyd

Appearing on his own behalf: Douglas Welder

Background

[1] The citation was issued on August 12, 2009. The citation authorized the Panel to inquire into the following alleged conduct of the Respondent:

1. You have failed to respond, substantively or at all, to the following requests for information made in the context of the Law Society's investigation of your practice pursuant to Rule 4-43 of the Law Society Rules, as set out and summarized in the Law Society's letters to you dated December 8, 2008; February 11, 2009; April 17, 2009; and June 9, 2009 (the " Letters"):

(a) you have not responded to the request that you " provide details of any bank accounts which hold or held trust or general funds for the period covered by the Report, ... explain the basis on which the funds are held and ... also explain any reason ... for continuing to deny the Law Society access for the records for those accounts" (page 7 of the December 8, 2008 Letter);

(b) you have not provided access to all of your trust and general bank account records;

(c) you have failed to respond to the questions set out in paragraphs A, B, D, E and J of the April 17 Letter.

In failing to respond substantively or at all as set out above, you have breached Rule 4-43(2)(b) of the Law Society Rules and/or Chapter 13, Rule 3 of the *Professional Conduct Handbook*.

[2] At the commencement of this hearing, the Respondent admitted that the requirements of Law Society Rule 4-15 regarding issuance and service of the citation had been met.

[3] The Respondent's position is that he has responded substantively to the requests for information and the questions posed by the Law Society.

Summary Hearing

[4] The Law Society proceeded with this hearing pursuant to Rule 4-24.1, which states:

4-24.1(1) This Rule may be applied in respect of the hearing of a citation comprising only allegations that the respondent has done one or more of the following:

- (a) breached a Rule;
- (b) breached an undertaking given to the Society;
- (c) failed to respond to a communication from the Society;

...

(2) Despite Rule 4-27(5), the Benchler presiding at a pre-hearing conference may order that the conference not consider any or all of the matters referred to in that subrule.

(3) Unless the panel rules otherwise, the respondent and discipline counsel may adduce evidence by

- (a) affidavit, or
- (b) an agreed statement of facts.

(4) Despite Rules 4-34 and 4-35, the panel may consider facts, verdict, penalty and costs and make one decision respecting all aspects of the proceeding.

[5] As set out above, the citation contains one charge containing three allegations that the Respondent failed to respond to communications from the Law Society. Therefore, this hearing may proceed pursuant to Rule 4-24.1.

[6] Rule 4-24.1 contemplates that the hearing will proceed by way of affidavit evidence or an Agreed Statement of Facts unless the Panel rules otherwise. In this case, the Law Society, with the Respondent's agreement, proceeded by way of affidavit evidence. In addition, the Respondent cross-examined the affiants and gave *viva voce* testimony. He was cross-examined by counsel for the Law Society.

[7] It was not necessary for this Panel to make any determination as to when and in what circumstances it might not be appropriate to proceed by way of affidavit evidence under Rule 4-24.1.

Oral Reasons

[8] At the conclusion of the hearing on March 4, 2010, the Panel gave a brief oral verdict with a written decision on Facts and Verdict to follow. Counsel agreed that submissions on penalty would await the written decision.

Onus and Standard of Proof

[9] The onus is on the Law Society to prove the allegations on a balance of probabilities. This is the standard set out by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, and adopted in *Law Society of BC v. Schauble*, 2009 LSBC 11.

Facts

[10] On or about May 1, 2007, the Law Society commenced an investigation into the conduct of the Respondent (the " Investigation").

[11] The Investigation was prompted by a complaint made by another member of the Law Society. It related to the alleged participation by the Respondent in an apparently fraudulent ponzi scheme. It was alleged that the Respondent had disbursed certain investors' funds from his trust accounts to International Fiduciary Corp. (" IFC") after the issuance of a Temporary Order of the British Columbia Securities Commission requiring that all persons cease trading in the IFC investment (the " Temporary Order"). As a result, the investors may have lost their funds. A Class Proceeding was commenced against the Respondent and another Law Society member on May 3, 2007.

[12] On May 3, 2007 the Chair of the Discipline Committee of the Law Society made an order pursuant to Rule 4-43 of the Law Society Rules that an investigation be made of the books, records and accounts of the Respondent.

[13] On May 10, 2007 Law Society staff attended at the office of the Respondent for the purpose of undertaking an audit of his books, records and accounts.

[14] During the period between May 10, 2007 and July 6, 2007 Law Society staff attended at the Respondent's office for a total of 13 days during the " field" part of the Investigation. There were numerous conversations between the Respondent, his staff and the employees of the Law Society during the 13 days. Although there is some dispute as to the import of those conversations, none of those disputes bear on the outcome of this inquiry.

[15] One of the documents reviewed by the staff of the Law Society was the Respondent's " Reporting Form, Trust Report" (" Form 47") filed July 17, 2006. The Form 47 indicated that the Respondent had operated only two trust accounts for the 12 months ended April 30, 2006. The Form failed to report the existence or particulars of the Respondent's general account. When asked by Law Society staff for information regarding his general account, the Respondent provided that information.

[16] As a result of one of the conversations between the Respondent and Law Society staff, there was reason to believe that the Respondent had operated other bank accounts, either trust or general, through which he conducted the business of his firm. However, during the field part of the Investigation, Law Society staff did not uncover documented evidence of other bank accounts.

[17] After Law Society staff left the Respondent's office, there were further requests for information from the Respondent. Some of those requests were answered. Some were not.

[18] On or about April 3, 2008, Law Society staff released an Interim Audit Report (the " Report") covering the period from April 1, 2004 to November 30, 2007. The scope of review of the Report was limited because Law Society staff could not confirm that they had examined all of the relevant bank and accounting records.

[19] Following the release of the Report, Law Society staff wrote to the Respondent on April 29, 2008 posing several questions and seeking clarification of the Respondent's position on several issues. The letter stated, in part (at p. 11):

Ms. Chan notes in the Report that you refused to permit the Law Society to have access to all of your trust account records. ...in light of Ms. Chan's findings, I consider that the Law Society must have access to all of your records in order to permit a complete audit to be conducted as part of the Law Society's overriding object and duty of protecting the public interest.

[20] The April 29, 2008 letter sought a response by May 27, 2008.

[21] On May 28, 2008, Law Society staff wrote to the Respondent and requested a response to the April 29, 2008 letter.

[22] On June 12, 2008, the Respondent called Law Society staff and requested an extension to June 30, 2008.

[23] On July 2, 2008, Law Society staff again wrote to the Respondent and requested his response.

[24] After a telephone conversation on July 3, 2008, the Respondent was granted an extension to July 31, 2008 to respond to the April 29, 2008 letter.

[25] The Respondent provided a response dated July 26, 2008 via a nine-page letter that provided substantive answers to many, but not all of the questions posed by Law Society staff in their April 29, 2008 letter. The letter closed with the sentence:

As to my other bank accounts, I am not prepared to grant you access to them.

[26] At some point between July and December, 2008, the Respondent retained counsel. Law Society staff wrote to the Respondent's solicitor on December 8, 2008 seeking further answers and clarification. That letter requested a response by January 14, 2009.

[27] Law Society staff wrote a follow-up letter to the Respondent's counsel on January 15, 2009.

[28] Despite three telephone conversations with the Respondent's counsel, no answer was received to the December 8, 2008 letter by February 10, 2009. As a result, Law Society staff followed-up with a further letter dated February 11, 2009 requesting a substantive response to the questions set forth in the December 8, 2008 letter. The February 11, 2009 letter requested the response by February 19, 2009.

[29] The Respondent phoned on February 19, 20 and 21, 2009. In each conversation he sought an extension of time.

[30] The Respondent sent a letter dated February 22, 2009 (but faxed February 24, 2009) to the Law Society.

[31] In the December 8, 2008 letter, Law Society staff had asked for specific information regarding bank accounts. The letter stated:

In order to avoid any ongoing confusion about which trust or general account records may be required by the Law Society, I ask that Mr. Welder provide details of any bank accounts which hold or held trust or general funds for the period covered by the Report, that he explain the basis on which the funds are held and that he also explain any reason he may have for continuing to deny the Law Society access to the records for those accounts.

[32] The Respondent's letter dated February 22, 2009, in answer to the request set out above, stated:

I will be discussing your request for access to my other accounts, [sic] with Mr. Perry and will advise

you once I have his advice.

[33] Law Society staff wrote to the Respondent on April 17, 2009 setting out several requests, five of which were as follows:

(A) ... I ask that you address why you failed to give the caution contemplated by Rule 1 of Chapter 4 of the *Professional Conduct Handbook*. If my understanding of your position is incorrect, I ask that you clarify your position.

(B) In regard to my question B, I ask that you address why you continued to accept pooled funds after becoming aware of the Temporary Order. As well, I ask that you comment on the appearance that you were assisting ET to knowingly avoid or evade the Temporary Order.

(D) If I understand your response correctly, you are taking a position that you cannot comment on the instructions received from ET. I disagree with you. If you are asserting privilege or confidentiality here, I suggest that this assertion cannot stand in the face of the apparent fraud that occurred here. As well, I point you to s. 88(1) of the *Legal Profession Act*. I request that you comment on the instructions you received from ET.

(E) This question referenced the December 8, 2008 letter which posed the question:

In the case of M Corp. and GC (see page 30 of the Report), it appears that you were put on notice that Mr. McCandless was refusing to disburse any further funds to IFC. It also appears that you agreed that you would accept an Investor Trust Deposit of US \$299,990 from Mr. McCandless on behalf of M Corp. and you then disbursed the funds to IFC. Please clarify the basis on which you disbursed funds to IFC, both in the context of your general knowledge of the regulatory action being taken against IFC and in the context of Mr. McCandless' apparent refusal to disburse the funds to IFC.

(J) You did not provide all of the information required by Ms. Chan. I attach a copy of the fax she sent you on February 25, 2008 setting forth her requirements. Ms. Chan has informed me that she has not received either the esilaw trust ledger for file no. 3827 or the statement of account for file 3827 for the balance of \$4,827.76. I again request that you provide Ms. Chan with what she needs.

[34] The Law Society's letter requested a response by May 1, 2009.

[35] The Law Society wrote to the Respondent again on May 6, 2009 requesting a response.

[36] The Law Society wrote to the Respondent again on June 9, 2009, again seeking answers to the questions that had been posed. No response was received from the Respondent.

[37] The affidavit evidence of Law Society staff confirms that no response had been received from the Respondent as of February 26, 2010.

[38] The Respondent gave evidence at the hearing. During the course of his evidence, the Respondent testified that during the period from April 1, 2004 to November 30, 2007 he had operated a total of three bank accounts relating to his practice. Those accounts were the two trust accounts that the Respondent had reported in his Form 47 as well as the general account that he had informed the Law Society investigators about at the beginning of the Investigation.

[39] It must be emphasized that it was only during the course of this hearing into his conduct that the

Respondent provided this confirmatory evidence about his bank accounts. He was given several opportunities to provide that information, or to clarify his position, in the correspondence with Law Society staff. The Respondent repeatedly submitted that it was his position that the Law Society did not have a right to have access to the records of any bank accounts that were not related to his law practice. We make no ruling on the Respondent's position in that regard. However, we note that the letters from Law Society staff, and in particular the December 8, 2008 letter, cannot reasonably be construed as requesting access to the Respondent's personal bank accounts. Despite the clear wording of that letter, and later letters, the Respondent did not provide the answer that he ultimately gave in evidence at this hearing.

[40] We pause at this point to note that the Respondent's conduct during the investigation was far from exemplary. He was not fully cooperative with Law Society staff during the field portion of the Investigation. Despite his protestations to the contrary, the evidence shows that he played a "cat and mouse" game with the investigators. He testified to the effect that, while he did not attempt to obstruct the investigation, he did not believe it was his duty to assist it. He did not dispute the evidence of Law Society staff that, in responding to follow-up requests for information, he advised Law Society staff that her requests were "not on the top of his priority list" and that he saw the additional requests as "a constant harassment." As set out in more detail above, the Respondent's written responses to questions from Law Society staff were provided well after the deadlines set by the Law Society, if they were provided at all.

[41] The Respondent's duty during an investigation is set out in Rules 4-43(2)(b) which states:

(2) When an order is made under subrule (1),

...

(b) the lawyer or former lawyer concerned must immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence and must provide any explanations that the persons designated by the Executive Director under paragraph (a) require for the purpose of the investigation.

[42] The Law Society has, as one of its primary responsibilities, the protection of the public interest. Law Society staff were investigating an allegation that the Respondent had improperly allowed investors' funds to be deposited in his trust account and that he had disbursed those funds to his client in the face of the Temporary Order. In pursuing that investigation, Law Society staff spent hundreds of hours reviewing the Respondent's books and accounts and preparing an Interim Audit Report. The Report was interim because Law Society staff could not determine whether they had reviewed all of the relevant documentation.

[43] The Respondent's conduct throughout this investigation demonstrated that his intention was to provide the minimum amount of information and cooperation. This course of conduct led to significantly more time being spent on the investigation by Law Society staff. It also led to more work for the Respondent himself and led to an air of suspicion and distrust, which, in part, led to this inquiry. The Respondent appeared not to appreciate that providing information to the Law Society could be exculpatory. More fundamentally, the Respondent failed to appreciate his obligation to cooperate with the investigation. See Rule 4-43(2)(b) of the Law Society Rules.

Allegation 1(a)

[44] Allegation 1(a) alleges that the Respondent failed to respond, substantively or at all, to the following requests for information:

(a) You have not responded to the request that you "provide details of any bank accounts which hold or held trust or general funds for the period covered by the Report, ... explain the basis on which the funds are held and ... also explain any reason ... for continuing to deny the Law Society access for the records for those accounts'. (Page 7 of the December 8, 2008 Letter)

[45] As set out above, there was significant correspondence between the Law Society and the Respondent requesting clarification about, and details of, any bank accounts that had held, or then held, trust or general funds during the period covered by the Report.

[46] The Respondent had provided information regarding his two trust accounts and one general account during the field part of the Investigation. He did not reply to the Law Society's written requests.

[47] However, given the Respondent's sworn testimony at the hearing, that he had no accounts other than the three accounts he had reported to the Law Society staff, we cannot find that the Respondent failed to "provide details of any bank accounts which hold or held trust or general funds". If no other bank accounts existed, there is no evidence that he failed to provide details of the other accounts.

[48] For the same reason, there is no evidence that the Respondent denied the Law Society access to the records of those other accounts.

[49] As a result, allegation 1(a) is dismissed.

Allegation 1(b)

[50] Allegation 1(b) alleges that the Respondent failed to provide access to all of his trust and general bank account records.

[51] For the same reasons set out in paragraphs [47] and [48], allegation 1(b) is dismissed.

[52] The evidence indicated that the Law Society staff was given access to the two trust accounts and one general account referred to by the Respondent. Based upon the Respondent's testimony at the hearing, the evidence is that those were his only accounts. As a result, this allegation is dismissed.

Allegation 1(c)

[53] Allegation 1(c) alleges that the Respondent failed to respond to the questions set out in paragraphs (A), (B), (D), (E) and (J) of the April 17, 2009 letter. The questions are outlined above in paragraph [33].

[54] During cross-examination of the Respondent, counsel for the Law Society took the Respondent through the questions asked in the April 17, 2009 letter.

[55] The Respondent agreed that he had not responded to the questions set out in the April 17, 2009 letter from the Law Society. The Respondent's submission was that his two letters, dated July 26, 2008 and February 22, 2009, constituted 11 pages of answers to the Law Society's questions. That submission ignored the fact that it is not the volume, but the substance of the responses that is in issue. There was no response to the questions posed in the April 17, 2009 letter. It was clear that Law Society staff was not satisfied with the Respondent's prior answers.

[56] As a result, we are satisfied that allegation 1(c) has been made out.

Tests for Professional Misconduct

[57] There is ample authority for the proposition that a failure to respond to communications from the Law

[57] There is ample authority for the proposition that a failure to respond to communications from the Law Society constitutes professional misconduct.

The *Professional Conduct Handbook*, Chapter 13, Rule 3, requires a Respondent to reply promptly to any communication from the Law Society.

[58] In *Law Society of BC v. Dobbin*, [1999] LSBC 27, the majority of the Benchers on review held:

19. Not all Rules in the *Professional Conduct Handbook* are created equal. ...

20. The duty to reply to communications from the Law Society is in yet another category. While it is true that the duty to reply is only found explicitly set out in Chapter 13, Rule 3, of the *Professional Conduct Handbook*, it is a cornerstone of our independent, self-governing profession. If the Law Society cannot count on prompt, candid and complete replies by members to its communications, it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law, and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.

...

25. Frequently, the member's failure to respond to Law Society communications is a sequel to a prior, frustrating failure to respond to client communications or to other lawyers' communications. Procrastination in responding to the Law Society, or wilful failure to respond to the Law Society, may be symptomatic of other practice problems involving delay on files or other dereliction of professional duty.

The Law Society is put in an impossible position in dealing with disgruntled clients, or disgruntled other lawyers, by a member's intransigent failure to respond. There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute. As a result, it is the decision of the Benchers that unexplained persistent failure to respond to Law Society communications will always be prima facie evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct. The circumstances which led the member to fail to respond are peculiarly within his or her means of knowledge. It cannot be a part of the evidentiary burden of the Law Society to show both that the member persistently failed to respond and the reasons for that failure.

[59] As noted above, the Respondent is alleged to have failed to respond to specific questions set out in the Law Society's letter dated April 17, 2009. It is evident that he did not answer those questions. The Respondent did provide some evidence indicating that he thought he had answered the questions in prior correspondence. However, it is clear that the Respondent did not provide any substantive answer, or any answer at all, to the questions set out in the April 17, 2009 letter. He has not provided any persuasive evidence that would excuse his conduct.

Verdict

[60] The Panel finds that the Respondent has committed professional misconduct as alleged in allegation 1(c) of the citation.

[61] In accordance with the agreement of counsel for the Law Society and the Respondent, the Panel directs that submissions on Penalty be made in writing. The Panel directs that the submissions of the Law Society be delivered within 21 days of the date of the release of this decision. The Panel further directs that the

submissions of the Respondent be delivered within 21 days of the delivery of the Law Society's submissions. Following the receipt of the Respondent's submissions, the Law Society will have seven days to deliver any submissions in reply.

[62] The Panel will notify counsel and the Respondent if there is a requirement for further oral argument.